

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2014020782

DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 18, 2014, in Torrance.

Claimant was not present for the hearing; he was represented by his mother and father.¹

Gigi Thompson, Manager, Rights Assurance, represented Harbor Regional Center (HRC or Service Agency).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on March 18, 2014.

ISSUE

Whether the Service Agency must fund five days per week of insurance copayments for claimant's ABA program.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-13.

Testimony: Audrey Clurfeld; Janine Strack; claimant's father.

¹ Party and family titles are used to protect the privacy of claimant and his family.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is three years and nine months old. He has an eligible diagnosis of autism.
2. Claimant is receiving applied behavior analysis (ABA) services funded by his private insurance, Anthem Blue Cross, through First Steps for Kids, at the rate of five hours per day, five days per week in the home, and three hours per day, five days per week at preschool in the Torrance Unified School District. His copayments are \$30.00 per day, with an annual copayment maximum of \$3,500.
3. HRC funded the copayments from January through June 2013, when the annual copayment maximum was met. In early 2014, claimant's parents again asked HRC to fund the copayments for five days per week.
4. By a Notice of Proposed Action letter dated February 7, 2014, HRC advised claimant's parents that HRC would fund copayments for only three days per week. HRC wrote that a number of the goals in claimant's ABA program were related to learning skills that should be the responsibility of claimant's local school district, and that only goals relating to pragmatic communication, self-help, and daily living skills would be appropriately addressed through a regional center program.
5. On February 14, 2014, claimant's mother filed a Fair Hearing Request on claimant's behalf with the Service Agency, appealing HRC's decision to not fund copayments for all five days per week.

Background Information

6. Claimant lives at home with his parents and older brothers.
7. Claimant is currently attending a special education pre-school program in his local school district for three hours per day, five days per week. Claimant also receives speech therapy services at school.

Insurance Copayment Assistance

8. The parties agree that claimant has a need for his ABA program. HRC argues, however, that only five to 10 hours of ABA is appropriate for a child over three years old, that more of claimant's goals should be focused on parent training, and that a program of ABA three hours per day, three days per week, would allow claimant to reach his regional center goals.
9. Claimant's insurance is funding for several goals through the ABA program. HRC contends that many of these goals are mirrored in claimant's individualized education

program (IEP) at school, or are in any event academic goals, and should, therefore, be the school district's responsibility, but HRC did not prove that. In many respects, the goals in question contain substantial overlap, i.e., the goals relate to both school activities and those engaged in the home and the community.

10. Janine Strack, Program Director at First Steps for Kids, testified that claimant has made significant progress in his ABA program. He was nearly non-verbal when he began, and had a high rate of problem behaviors of high intensity. His program has increased claimant's functional communication, which is important in reducing problem behaviors. Because claimant is showing the best outcome response at current levels, it is important to continue to provide services at current levels. Strack does not believe claimant will continue on the same trajectory if services are reduced. If a reduction in copayment assistance causes the family to cut back on the level of services, it will not benefit claimant. According to Strack, school districts do not fund insurance copayments.

11. HRC has offered to work with claimant's family in advocating that the school district provide claimant with 25 to 30 hours per week of programming, rather than the 15 hours per week that he currently receives, to assist claimant in accessing the school curriculum.

12. There is no dispute that claimant's family meets the financial criteria for copayment assistance by HRC.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.) Claimant requested a hearing and, therefore, jurisdiction for this appeal was established. (Factual Findings 1-5.)

2. The burden of proof is on the party seeking government benefits or services. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, claimant bears the burden of proof because he is seeking funding for copayments in 2014, which HRC has not before agreed to provide. (Factual Findings 1-5.) Claimant must prove that he is entitled to the funding by a preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

Insurance Copayment Assistance by Regional Centers

3. Prior to July 1, 2012, regional centers in California funded behavior therapy services for many autistic children and their families. The Legislature passed Insurance Code

section 10144.51, obligating insurers to fund behavioral therapy for children with autism, effective July 1, 2012.

4. In complying with this mandate, insurers have generally imposed copayment obligations on their insureds. Many families who had received full funding of behavior therapy services through regional centers before July 2012, became responsible for partially paying for these services. Families began asking their regional centers to pay these insurance copayments.

5. In response, the Legislature enacted section 4659.1, effective June 27, 2013. Section 4659.1, subdivision (a), provides that if “a service or support provided pursuant to a consumer’s individualized program plan under this division . . . is paid for in whole or in part by the consumer’s parents’ private insurance, when necessary to ensure that the consumer receives the service or support, the regional center may pay any applicable copayment associated with the service or support,” under specified conditions. Absent exceptional circumstances, a regional center may fund insurance copayments if the family’s annual gross income is less than 400 percent of the federal poverty level. (§ 4659.1, subd. (a)(2).) In this case, the parties agree that claimant’s family meets the criteria for copayment assistance.

6. HRC correctly argues that section 4659.1 does not void other provisions of the Lanterman Act, such as sections 4560, 4620.3, 4646, 4646.4, 4646.5, 4647, and 4648, which require regional centers to provide services only when necessary, to provide them cost-effectively, and to utilize generic resources. Section 4659.1, subdivision (a)(3), states that copayment assistance may be provided only when “[t]here is no third party having liability for the cost of the service or support, as provided in subdivision (a) of Section 4659. . . .” In turn, section 4659, subdivision (a), requires regional centers to identify and pursue all other funding sources, such as Medi-Cal, school districts, and private insurance.

7. Claimant’s local school district is a generic resource that has a responsibility to provide appropriate services to meet claimant’s needs, as outlined in his IEP, to allow him to access a free and appropriate education. (20 U.S.C. § 1437 (a)(8).) Education Code sections 56520 and 56523 provide that behavioral interventions should be included in IEPs when necessary, and that in particular situations a behavioral management plan is to be developed and used, to the extent possible, in a consistent manner when the pupil is also the responsibility of another agency for residential care or related services. (Ed. Code, § 56520, subd. (b)(2).) A school district, then, must also meet its responsibility for providing needed services, even when another agency, such as a regional center, is also responsible for the student.

8. But HRC erroneously argues that the aforementioned provisions allow it to reduce the amount of copayment assistance they may provide claimant’s family. There is no dispute that claimant needs the ABA program. Claimant and HRC have sought out cost-effective funding and utilized a generic resource by seeking ABA through claimant’s private insurance. Claimant’s family meets the criteria for financial assistance provided by section 4659.1. By the very wording of that statute, copayment assistance is “necessary to ensure that the consumer receives the service or support,” here the ABA program.

9. As a factual matter, it was not proven that much, if any, of claimant's current ABA program contains goals solely within the purview of his local school district. The goals in question have substantial overlap between learning goals usually funded by a school district and those related to home and community, which are traditionally the responsibility of a regional center. Moreover, the ALJ is aware of no provision in federal or state special education law which mandates or allows school districts to reimburse families for insurance copayments, and there was testimony that school districts do not pay for copayments. If HRC is concerned that claimant's local school district is not providing sufficient services, or should be funding part of claimant's ABA needs, HRC personnel should assist claimant's family in those regards.

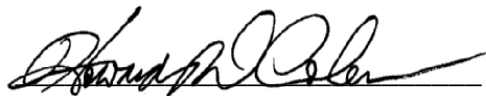
10. Finally, regional centers previously funded a consumer's entire ABA program with goals directed at home and community activity. With the advent of private insurance covering such services, and only financially needy families being eligible for copayment assistance, regional centers are now saving significant amounts in this area. To allow regional centers to shoulder a family's copayment costs in those limited circumstances will not run afoul of the dictates of the Lanterman Act requiring regional centers to fund services in a cost-effective manner.

11. Under sections 4659, 4659.1, 4646, 4646.4, 4646.5, 4647, and 4648, claimant established by a preponderance of the evidence that cause exists to order HRC to reimburse claimant's family's copayment for all five days of claimant's ABA program provided by First Steps for Kids. (Factual Findings 1-12 & Legal Conclusions 3 -11.)

ORDER

Claimant's appeal is granted. The Service Agency shall be responsible for funding all five days of copayments for his ABA program provided by First Steps for Kids.

DATED: April 7, 2014



HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.